



Limitations of litigation as a tool for achieving social change: A perspective on South African and Zimbabwean litigation environment.

by

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DECLARATION

I, 1344993 (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

This research report seeks to investigate and analyse the limitations of using litigation as a tool for achieving social change in the legal environments of South Africa and Zimbabwe, with a particular focus on relevant provisions in the Constitutional framework. In other words, I consider how litigation related to socioeconomic rights, with a particular focus on the right to healthcare, has been limited in its capacity to bringing about societal transformation. Juxtaposing these legal systems should highlight the opportunities and challenges of utilising litigation. In South Africa the 1996 Constitution, and in Zimbabwe the 2013 Constitution play a significant role in shaping socio-economic rights, enhancing access to justice, and promoting social transformation. Further, the Bill of Rights and the Constitutional Court all contribute to the potential effectiveness of litigation. Relying on the Constitutional framework, literature concerning the effectiveness and critique of litigation, and case studies from South Africa and Zimbabwe the article illustrates the potential and shortfalls of litigation in advancing socio-economic rights. The argument highlights that litigation has made substantial advancements in effecting systemic and policy changes, as well as in holding governments accountable. However, it also emphasizes the existence of potential obstacles, such as the failure to implement court orders, institutional barriers, and structural or procedural issues that require addressing in the pursuit of societal transformation. The research report concludes that whilst litigation can be seen as just one tactic in the repertoire for challenging societal and systemic injustices, it must however, be complemented with a broad range of strategies that include advocacy, grassroots movements, and policy reform, to address the complex underlying causes of social issues effect social change in South Africa and Zimbabwe.

Key words

Litigation, Social change, Socio-economic rights, Right to healthcare, South Africa, Zimbabwe

1. Introduction

What are the limitations to using litigation in the struggle for social change? This question has triggered a lively debate in academic and legal circles in the past years.¹

In this research report, I grapple with aspects of this question in the context of socio-economic rights with reference to the right to healthcare, and the limits of litigation to achieve social change. While social change has been defined as effective utilization of rights to create meaningful and sustainable impact on the ground for the individuals or groups that are intended to benefit from those rights by Doug Coltart,² Rosenberg defines social change as ‘policy change with a nation-wide impact’ that affects a ‘large group of people.’³

I argue that social change encompasses the process of altering societal attitudes, institutions, and structures gradually, all while striving to achieve equality, justice, and the fulfilment of socio-economic rights to the benefit of rights holders. Therefore, social change entails more than just possessing rights in theory; it involves the translation of those rights into tangible, positive outcomes for individuals in the real world.

Social change can be achieved through the use of law.⁴ Law encompasses institutions such as courts, lawyers, judges, clients and citizens who adopt legal ideology and legal system to effect social change.⁵ In this research report, I focus on examining litigation as a means to achieve social change within South Africa and Zimbabwe.

Litigation can be defined as actions contested in court, characterised by three key components: firstly, a claim representing an active effort to achieve a desired goal, secondly, a conflict or dispute that arises when there is opposition to the claim, and thirdly, the

¹ GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991). Rosenberg contends that court-based strategies represent a “hollow hope,” holding the view that little evidence exists to suggest that courts directly bring about social change or that litigation victories produce indirect effects that contribute to social change. D NeJaime, ‘Winning through losing’ (2011) 96 *Iowa Law Review* 941-1012. S Budlender, G Marcus & N Ferreira, ‘Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons’ 2014. J Brickhill, ‘Public Interest Litigation and Social Change in Zimbabwe,’ (2021).

² D Coltart, ‘Legal strategies for social change’ in J Brickhill (ed) *Public interest litigation and social change in Zimbabwe* (2021) 34, 35 and S Budlender, G Marcus & N Ferreira ‘*Public interest litigation and social change in South Africa*’ (2015) *The Atlantic Philanthropies*.

³ PH Schuck, ‘Public Law Litigation and Social Reform’ (1993) 102 *Yale Law Journal* 1763, 1766.

⁴ SLR Anleu, *Law, and Social Change* (2000) 2.

⁵ Anleu (Note 4 above) 10.

utilization of the legal system, particularly the court, to address and resolve this conflict or dispute.⁶ Therefore, litigation encompasses the act of pursuing legal measures within court systems with the aim of challenging established laws, policies, or practices.⁷ This not only fosters societal progress as individuals assert their rights and demand institutional accountability but also contributes to perpetuating social change. This proposal raises questions about my specific definitions of social justice and injustice, and their interconnectedness, particularly in the context of human rights litigation, focusing on the right to health and socio-economic rights.

The Oxford Dictionary provides a concise explanation of justice by defining it as ‘just behaviour or treatment,’⁸ this would mean treating an individual or a class of individuals in a way that is equitable and fair. Justice Malaba⁹ explained justice as an unwavering dedication to bestowing upon each person their rightful entitlement, coupled with the level of fairness discerned during the resolution of conflicts and redress of grievances.¹⁰ Social justice, therefore, means addressing systemic disadvantages, bias, and disparities by emphasizing fair processes, inclusive participation, and recognizing the rights of marginalized groups, which essentially involves redistributing resources and goods.¹¹ This would include both past and present disadvantages, disparities and bias.

Comparing the litigation landscapes of South Africa and Zimbabwe provides nuanced insights into the limitations of using litigation as a tool for social change, considering legal frameworks, socioeconomic factors, and case studies. Recognizing and acknowledging the constraints sets the stage for recommending more effective use of litigation and other strategies to drive social change. This research report seeks to make a valuable contribution to literature

⁶ LM Friedman, ‘Litigation and Society’ (1989) 15 *Annual Review Sociol* 17, 18.

⁷ R Gettings, ‘Litigation as a tool for social change’ (1980), *Journal of health and human resources administration*, 316.

⁸ Oxford English Dictionary < <https://www.oed.com/search/dictionary/?scope=Entries&q=JUSTICE> >

⁹ Honourable Mr Justice Luke Malaba Chief Justice of Zimbabwe.

¹⁰ J L Malaba, Keynote address presented on the occasion of the annual access to justice and pro-deo review conference under the theme: Strengthening Collaborative Efforts Towards a Competent and Coordinated Pro-deo System and Access to Justice for Women, Men and Children in Zimbabwe, (2022) < <https://www.jsc.org.zw/upload/Publications/Keynote%20Address%20to%20Delivered%20by%20the%20Chief%20Justice%20at%20the%20Law%20Society's%20Annual%20Access%20to%20Justice%20and%20Pro-Deo%20Review%20Conference%20on%2021%20September%202022%20-%20The%20Pro%20Deo%20System.pdf> >

¹¹ A Coburn & S Gormally, ‘Social Justice and Equality,’ (2017) 483, *Communities for Social Change: Practicing Equality and Social Justice in Youth and Community Work*, 51, 55.

focusing on the role of litigation in achieving social change. It should be relevant and useful to not only judges, attorneys, and non-governmental organizations involved in human rights litigation but also to scholars specializing in the field of human rights, with a particular focus on socio-economic rights. The research will in no doubt highlight the implications for future research and practice.

The rest of the research report is structured as follows: the next section reviews briefly previous studies and literature on the subject generally. This is followed by a short historical overview of the use of litigation in South Africa and Zimbabwe. Subsequently, the main analysis of the report, encompassing the Constitutional frameworks, case studies, and limitations, is presented, followed by the conclusion.

2. Literature review

The effectiveness of litigation as an instrument for social change emerges as widely discussed and significant topic in academic discourse. Chenwi¹² for instance, observes the role of litigation in effecting social change with regards to inequalities and access to services by the marginalised communities and the poor. Academics such as Brickhill,¹³ Cote and Garderen,¹⁴ Chenwi,¹⁵ Budlender, Marcus and Ferreira,¹⁶ and Gloppen¹⁷ examine cases such as the *Grootboom*¹⁸ on the right to housing, the *Treatment Action Campaign*¹⁹ on the prevention of mother-to-child transmission of HIV, *Mazibuko*²⁰ on access to water, to mention a few. These serve as notable examples in this research and the debates raised thereon with regards to litigation and social change.

¹² L Chenwi, 'Socio-economic Gains and Losses: The South African Constitutional Court and Social Change' (2011) 41 *Social Change*, 427–444.

¹³ J Brickhill, 'Public Interest Litigation and Social Change in Zimbabwe,' (2011) Zimbabwe Lawyers for Human Rights.

¹⁴ D Cote & JV Garderen, 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest,' (2011) 27 SAJHR 167.

¹⁵ Chenwi (note 11 above).

¹⁶ S Budlender, G Marcus SC & N Ferreira, 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons,' (2014).

¹⁷ S Gloppen, *Social Rights Litigation as Transformation: South African Perspectives*, (2005)

¹⁸ *Grootboom v Oostenberg Municipality* 2001 (3) BCLR 277 (CC).

¹⁹ *Minister of Health and Others v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC).

²⁰ *Mazibuko and Others v City of Johannesburg* 2010 (3) BCLR 239 (CC).

Cummings and Rhode acknowledge that law, through litigation, can be used as a tool of achieving social change based on its relative autonomy from politics.²¹ The idea of court centred social change in the United States was mainly fostered by public law interest movements that emerged in the 1960's.²² Their victories gave them prominence and funding which allowed them to involve courts in progressive social transformation.²³ This is exemplified by the landmark case of *Brown*²⁴ challenging segregation.²⁵

2.1 Review of previous studies on the limitations of litigation for social change

Judicial institutions have been pivotal in instigating significant societal transformations; a substantial portion of these changes can be attributed to persistent endeavours in the realm of litigation.²⁶ However, it must be noted that litigation has its own limitations depending on the legal system in question or in context. The adversarial nature of litigation and fixation on litigation as a tool for social change tends to promote one on one conflicts which ends up dividing rather than uniting those who seek change.²⁷

Litigation can be slow and complex, for instance, in cases that involve a large number of victims and a formidable opponent employing delaying or procedural tactics.²⁸ The Legal Resource Foundation²⁹ has pointed out that the nature of litigation in certain contexts, such as in Zimbabwe, can act as a barrier for "self-represented litigants."³⁰ Individuals, lacking familiarity with the technical rules and procedures of the legal system, find themselves at a

²¹ SL Cummings & DL Rhode, 'Public interest litigation: insights from theory and practice,' (2009), 36(4), *Fordham Urban Law Journal*, 606.

²² Ibid.

²³ Ibid.

²⁴ *Brown v Board of Education* (1956).

²⁵ Prominent examples of litigation being employed to achieve social change include the Montgomery bus boycott which was a long 13-month mass protest that ended with the U.S. Supreme Court ruling that segregation on public buses is unconstitutional in the period 1955-56 <<https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott>>; *Brown v Board of Education* (1956) The U.S. Supreme Court held that segregation of public schools was a violation of the 14th amendment.

²⁶ J Greenberg, *Judicial process, and social change: Constitutional litigation cases and materials* (1977) 580.

²⁷ SA Scheingold, *The politics of rights: Lawyers public policy and political change* (2004) 214.

²⁸ Ibid.

²⁹ The Legal Resource Foundation in Zimbabwe aims to enhance access to justice and human rights through legal aid, education, advocacy, and strengthening the justice delivery system.

³⁰ Legal Resource Foundation 'The Recognition of Paralegals and Access to Justice in Zimbabwe' (2020) 15. < <https://lrfzim.com/wp-content/uploads/2021/03/Research-Report-on-Paralegalism-and-Access-to-Justice-in-Zimbabwe.pdf> >

distinct disadvantage when litigating. Legal rules are among instruments that are wielded by the economically powerful to protect their interests, hence the unequal distribution of wealth and power renders litigation futile.³¹

Further, it is significant to note that using litigation as a tool for achieving social change faces institutional limitations.³² Various studies³³ have examined these institutional limitations, shedding light on complexities such as inadequate funding, separation of powers.³⁴ Institutional constraints would imply that the judiciary has a limited capacity to implement and enforce court decisions. This has been noted by Roni Amit³⁵ who explains that the judiciary is the weakest branch of the government as it does not have the necessary budgetary enforcement power of its decisions.³⁶

Whilst litigation can result in favourable court judgments, one cannot shy away from that the implementation of such decisions does not lie with the courts. Greenberg echoes this by asserting that the effectiveness of the judgments by the court depends on other political institutions of the government, who have the necessary consent to command the resources of administration.³⁷ In this regard, there's nothing more problematic than a vague legal pronouncement that stays abstract and gets sidestepped.³⁸ Hence, non-compliance and inadequate implementation of judicial decisions partially restricts the effectiveness of litigation.

Amit further notes that the effectiveness of litigation may be limited by the principle of separation of powers, which mandates the judiciary to restrict the scope of its judgment to prevent encroachment upon the functions of other branches of the government.³⁹ This principle is manifestly presented both in South African and Zimbabwean Constitutions as

³¹ D Bell, 'Law, litigation and the search for the promised land,' (1987) *The Georgetown Law Journal*, 232.

³² Ibid 9.

³³ Ibid and D Erasmus & A Hornigold 'Court Supervised Institutional Transformation in South Africa' (2015) 18 *PER/PELJ* (7) 2457-2460

³⁴ Ibid.

³⁵ R Amit, 'Winning isn't everything: Courts, context, and the barriers to effecting change through public interest litigation' (2011) *SAJHR*, 10.

³⁶ View is also shared by, MJ Majuta, et al 'The Judicial Role in the Legislative Lawmaking Process in Africa: The South African Case' (2015) 42 *African Review*, 1, 22.

³⁷ J Greenberg (Note 24 above) 560-562.

³⁸ Ibid 562, Frankfurter as quoted in Greenberg.

³⁹ Amit (note 31 above) 10.

having 3 distinct branches of government: the Legislature, the Executive, and the Judiciary. Each branch has distinct functions and responsibilities, as outlined in the following sections. Hence, existing legal framework and institutional structures hinder litigation to impact social change.

The effectiveness of litigation in addressing systemic issues is notably dependent on the specific relief sought in each case. For instance, when there is litigation against the government, it is often the case that the judiciary might end up having to make public policy.⁴⁰ For that reason, litigation can potentially be a double-edged sword when it comes to systemic change. Implying that in cases where litigation seeks only individual remedies such as injunction or restitution, its impact on systemic issues might be limited. Pieterse's counterargument is that in cases where litigation is pursued as part of a broader political struggle, a victory can yield substantial momentum for social movements.⁴¹ This momentum can reshape the political landscape and, in turn, facilitate future political successes.⁴² Roach and Budlender assert the usefulness of court's wide remedial powers⁴³ in instances where there is need to enforce systemic change as contemplated in the Constitution.⁴⁴

However, the principle of separation of powers does not limit litigation directly, but there have been suggestions that the judiciary should be careful and avoid engaging in policy formulation and legislative activities.⁴⁵ This indirectly affects the impact of litigation on social change, as judges' decisions are bound by existing legal frameworks, while transformative change often demands addressing the root causes of social problems beyond the legal context. To challenge this stance, Corder⁴⁶ has made observations and recommendations that judges in South Africa do play an activist role.⁴⁷ This means that there are elements of judicial activism within, as he terms it "judicial activism of a special type." To substantiate this

⁴⁰ Erasmus & Hornigold (Note 29 above), 2463.

⁴¹ M Pieterse, 'Health, Social Movement and Rights Based Litigation in South Africa,' (2008) 35 *Journal of Law and Society*, 364, 383-384.

⁴² Ibid.

⁴³ K Roach & G Budlender, 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) *SALJ* 325, 326.

⁴⁴ See section 33 and 172(1)(b) of the 1996 Constitution.

⁴⁵ TT Magabe & OO Kola, 'Separation of Powers, Checks and Balances and Judicial Exercise of Self-Restraint: An Analysis of Case Law,' (2021) 42 *Obiter*, 547, 553.

⁴⁶ H Corder, 'Judicial Activism of a Special Type: South Africa's Top Courts Since 1994 in (eds) B Dickson 'Judicial Activism in Common Law Supreme Courts' (2017).

⁴⁷ See section 39 of the 1996 Constitution.

argument, the significance of *Fourie v Minister of Home Affairs*⁴⁸ lies in its illustration that courts possess a certain level of authority to influence public policy to some extent.

Litigation processes can be costly, making it difficult especially for the marginalised communities to access justice. Centre on Housing Rights & Evictions⁴⁹ and Legal Resource Foundation⁵⁰ note that litigation requires significant financial resources which if not available compromises access to justice. Brickhill argues, referencing class actions, that when the expenses of litigation become excessive, it can result in injustice for marginalized groups.⁵¹ His argument refers to the Silicosis litigation as an example,⁵² suggesting that high fees and costs in legal proceedings create financial barriers that impede the fundamental right of access to the courts.

3. Litigation as a tool for achieving social change: A historical perspective

3.1 Litigation for Social Change in South Africa and Zimbabwe: A Brief History

Examining the legal landscapes preceding the enactment of respective Constitutions provides insight into the transformative intentions behind these enactments and the persistent challenges post-implementation.⁵³ Before 1994 in South Africa, the environment for litigation was greatly limited because prior, South Africa was characterized by parliamentary sovereignty. This refers to the principle that the legislative body, has the ultimate legal authority and can make or repeal laws without being overruled by any other authority,

⁴⁸ Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs [2005] ZACC 19

⁴⁹ Centre on Housing Rights & Evictions, 'Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies' (2003) 20.

⁵⁰ Legal Resource Foundation (Note 27 above) 10-11.

⁵¹ J Brickhill, 'A river of disease: Silicosis and the future of class actions in South Africa,' (2021) 37 *SJHR* 31-58.

⁵² Ex Parte Nkala [2019] ZAGPJHC 260.

⁵³ See generally, M Pieterse, 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law*, 155.

including the judiciary,⁵⁴ there was no review of governmental acts or being subjected to the Bill of Rights.⁵⁵

The apartheid system enforced racial segregation and discriminatory policies mostly against black people.⁵⁶ The fight through litigation against discrimination and racial segregation can be highlighted by the key legal cases such as the *Delmas Treason Trial* (1985-1990) and the *Rivonia Trial* (1963-1964). Academics contend that it was due to these actions that litigation then emerged as a fundamental instrument for challenging apartheid laws.⁵⁷

Organizations such as Legal Resources Centre (LRC)⁵⁸ and the Centre for Applied Legal Studies,⁵⁹ played a crucial role in challenging apartheid legislation, promoting human rights, providing legal assistance to victims of human rights abuses, advocating for legal reforms and advancing social justice.⁶⁰ Mgoqi examines and reports on cases and actions taken by the LRC, in challenging apartheid-era laws and advocating for the rights of marginalized groups.⁶¹ He notes the work of LRC as most significant in relation to land and housing rights, workers' rights.⁶²

Utilisation of litigation as a tool for achieving social change in Zimbabwe has also played a significant role throughout history. However, what must be noted is that the Lancaster House Constitution⁶³ contained a Declaration of Rights and restrictions on the principles of legal standing which limited rights-related litigation.⁶⁴ The judiciary's limited interpretation of standing rules acted as a barrier to human rights litigation, for instance, in *The United Parties*

⁵⁴ PG Danchin, 'From Parliamentary to Judicial Supremacy: Reflections in Honour from Parliamentary to Judicial Supremacy: Reflections in Honour of the Constitutionalism of Justice Moseneke of the Constitutionalism of Justice Moseneke' (2017) *Acta Juridica*, 29, 34.

⁵⁵ CRM Dlamini, 'Parliamentary Sovereignty, a Bill of Rights, and Judicial Review' (1989) *De Rebus* 865-869.

⁵⁶ See generally the Group Areas Act of 1950; Promotion of Bantu Self-Government Act of 1959; Bantu Homelands Citizenship Act of 1970.

⁵⁷ S Budlender et al (Note 15 above) 7.

⁵⁸ W Mgoqi, 'The Work of the Legal Resources Centre in South Africa in the Area of Human Rights Promotion and Protection,' (1992) 36 *Journal of African Law*, 1-10.

⁵⁹ The Center was founded with the goal of promoting law reform and enhancing access to justice during apartheid. < <https://www.wits.ac.za/cals/about-us/> >

⁶⁰ J Brickhill, 'Public Interest Litigation in South Africa' (2018) 34-40.

⁶¹ W Mgoqi (Note 58 above) 3-7.

⁶² Ibid 6.

⁶³ Lancaster House Agreement, 1979.

⁶⁴ L Chidzuza & PN Makiwane, 'Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An analysis of the Provisions in the New Zimbabwean Constitution' (2016) *PER/PELJ*, 2.

v Minister of Justice, Legal and Parliamentary Affairs,⁶⁵ *Capitol Radio (Pvt)Ltd v Broadcasting Authority of Zimbabwe*.⁶⁶

Further, human rights litigation was considered by the government to be an 'anti-government activity by those disloyal to the country.'⁶⁷ This perspective reflects a challenging environment where the government's response to litigation was influenced by political considerations rather than a commitment to upholding human rights and the rule of law.⁶⁸

Therefore, effectiveness of litigation in driving social change historically in South Africa and Zimbabwe varies, influenced by factors such as the nature of the issue, the legal framework, the legal system, and the broader societal and political context. Litigation played a role in advancing social justice in some cases, but its impact was limited in others. For instance, in Zimbabwe before the coming into operation of the 2013 Constitution as with the rules of standing.⁶⁹ Further discussion and analysis on the Constitutional frameworks for litigation as a tool for achieving social change, along with its limitations regarding socio-economic rights, is provided in the following sections.

4. Constitutional frameworks for litigation as a tool for achieving social change

4.1 Legal systems in South Africa and Zimbabwe: A comparative analysis

South Africa and Zimbabwe have distinct litigation environments; however, there are some similarities between them in their legal systems, owing to the historical and legal connections the two Republics have. A legal system can be described as the comprehensive body of laws within a specific society, encompassing the processes by which these laws are created, enforced, and the institutions responsible for their formulation and implementation.⁷⁰ In both

⁶⁵ 1997 (2) ZLR 254.

⁶⁶ 2003 ZWSC 65.

⁶⁷ A de Bourbon, 'Human rights litigation in Zimbabwe: Past, present and future,' (2003) *African Human Rights Law Journal*, 217.

⁶⁸ In cases involving past electoral issues and politics, the litigation environment in Zimbabwe is generally complex, politically charged, and mirrors the broader dynamics within the country. See *Mawarire v Mugabe* [2013] ZWCC 1, *Mavedzenge v Minister of Justice, Legal & Parliamentary Affairs* [2018] ZWCC 5, *Liberal Democrats v President of the Republic of Zimbabwe* [2018] ZWCC 7.

⁶⁹ Section 24(1) of the Lancaster House Constitution limited access to the court by constraining *locus standi*, allowing only individuals acting in their own interests to approach local courts for relief. This stance hindered civil society organizations from seeking justice on behalf of the marginalised.

⁷⁰ L Madhuku, *An Introduction to Zimbabwean Law*, (2010) 6.

countries, the legal systems play a crucial role in shaping the course of social change through litigation.

In South Africa, it is essential to note that the Constitution of the Republic of South Africa, 1996⁷¹ is the supreme law. This shifts the locus of ultimate legal authority from Parliament to the Constitution, thereby moving away from parliamentary sovereignty and towards constitutional supremacy. Furthermore, there is an endeavour to establish legal pluralism evident, which is aimed at harmonizing customary law with the principles enshrined in the Constitution. Additionally, South Africa has a hybrid legal system,⁷² thus has elements of civil- (Roman-Dutch) law tradition, the English common-law tradition and African tradition (indigenous law).⁷³

The court system consists of the Constitutional Court, Supreme Court of Appeal, and the High Court is the main trial court. The Constitution of the Republic of South Africa provides for the right to access to courts,⁷⁴ and have a legal representative assigned by the state if substantial injustice would otherwise occur.⁷⁵ In *President of the Republic of South Africa v Modderklip Boerdery*⁷⁶ the constitutional court held that, once a constitutional violation is proven, the courts are required to provide a remedy that is both appropriate and effective; consequently, Modderklip was entitled to such appropriate relief. Notably these provisions highlight that the legal system of South Africa is committed to providing access to justice for everyone, exercise their rights and seek remedies effectively.

Regarding the Zimbabwean legal system, it is composed of common law and customary law,⁷⁷ and the system is codified; therefore, Zimbabwe has a dual legal system.⁷⁸ Taking that into consideration, it is evident that Zimbabwe possesses a pluralistic legal system. It is

⁷¹ Hereinafter referred to as 'the 1996 Constitution' for clarity and to distinguish it from the Zimbabwean 2013 Constitution.

⁷² C Rautenbach & W du Plessis, 'African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In)novatio or Confusio?' (2012) 57 *McGill Law Journal* 749, 749.

⁷³ Ibid.

⁷⁴ 1996 Constitution s34.

⁷⁵ Ibid section 35.

⁷⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty)Ltd* 2005 5 SA 3 (CC).

⁷⁷ TW Bennett, 'Conflict of Laws – The application of Customary Law and the Common Law in Zimbabwe' (1981) *International and Comparative Law Quarterly*, 64.

⁷⁸ Ibid 68.

noteworthy that Zimbabwe's constitution, enacted in 2013,⁷⁹ holds particular significance and is the supreme law of the Republic. This means that all other systems must align with the 2013 Constitution and its principles. The 2013 Constitution also outlines the judiciary and court system in Chapter 8. There has been a heated debate around the issue of rule of law in Zimbabwe,⁸⁰ hence, the significance of rule of law must be noted regarding its impact on social change.

The South African legal system has therefore, undergone significant historical and socio-economic transformations over the past three decades, for instance, Muslim marriages are now legally recognised in South Africa as was held by the Constitutional Court.⁸¹ Certainly, these factors have significantly influenced the pursuit of social change through litigation. The history of South African legal system greatly characterised by apartheid system,⁸² as well as the ongoing process of constitutional transformation, have shaped the legal landscape and created unique challenges and opportunities in the fight for social change.

Similarly, Zimbabwe's post-independence economic and social landscape, the enactment of the 2013 Constitution have significantly influenced the litigation environment and its potential to bring social change. For instance, child marriages were recently banned in the case of *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs*,⁸³ as it was held by the court that certain provisions of the Marriages Act Marriage Act [Chapter 5:11] and Customary Marriages Act [Chapter 5:07] were discriminatory as well as inconsistent with the 2013 Constitution.

⁷⁹ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 shall henceforth be referred to as the 2013 Constitution.

⁸⁰ See S Buchanan-Clarke & S Mashingaidze, 'Rebuilding Constitutionalism and Rule of Law in Zimbabwe' Policy Briefing: Research Precision, Governance Passion (August 2021), see also JI Williamson, 'Seeking Civilian Control: Rule of Law, Democracy, and Civil-Military Relations in Zimbabwe' (2010) 17 *Indiana Journal of Global Legal Studies*, 389-411.

⁸¹ *Women's Legal Centre Trust v President of the Republic of South Africa* (2022) ZACC 23.

⁸² T Masipa, 'South Africa's transition to democracy and democratic consolidation: A reflection on socio-economic challenges' (2018) 18(4), *Journal of Public Affairs*, 1-3.

⁸³ *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12.

4.2 South African Constitution of 1996 and its provisions

The primary and significant vehicle for social transformation in South Africa is the 1996 Constitution,⁸⁴ it is pivotal in the transformative constitutionalism project.⁸⁵ Transformative constitutionalism involves legal-based processes aimed at effecting social change.⁸⁶ In the context of litigation and social change, transformation is required through the establishment of clear aspirations and intentions and a commitment to democratic values.⁸⁷ This transformation is also mandated by requiring judges to actively promote constitutional values, revise legal culture and the judicial mindset, and strike down non-compliant laws or conduct.⁸⁸ The 1996 Constitution is renowned globally for its progressive nature, marked by its incorporation of robust and comprehensive clauses, particularly focusing on socio-economic rights.⁸⁹ Under this heading I will consider provisions related to litigation and achieving social change such as the Bill of Rights, justiciability of socio-economic rights, procedural rules of litigation, remedies and redress and the Constitutional court's role.

To begin with, South Africa's Constitution contains a Bill of Rights,⁹⁰ which sets out fundamental human rights of every individual in the Republic such as socio-economic rights, civil rights, and political rights. Some of the socio-economic rights that are encompassed in the Bill of Rights include, the right to housing,⁹¹ right to health care,⁹² rights to education,⁹³ and social security.⁹⁴ In this research report, I will specifically analyse the right to health among the socio-economic rights provided in the Bill of Rights. Rights establish the legal framework that enables individuals and organizations to challenge discriminatory laws,

⁸⁴ Socio-economic rights institute, 'Public interest legal services in South Africa' (July 2015) Project Report, 7.

⁸⁵ See generally E Kibeth & C Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340; JP Langa, 'Transformative constitutionalism' (2006) *Stell LR* 351-360.

⁸⁶ Judge President Dunstan Mlambo, 'Transformative Social Change and the Role of the Judge in Post Apartheid South Africa' (2022) *Stell LR*, 595, 596.

⁸⁷ *Ibid* 596-598.

⁸⁸ *Ibid*.

⁸⁹ S Budlender et al (Note 16 above) 148; W Binford, 'The Constitutionalization of Children's Rights in South Africa' (2016) *NYLS Law Review*, 333, 352.

⁹⁰ Chapter 2 of the Constitution of 1996.

⁹¹ Section 26 (1) of the 1996 Constitution.

⁹² Section 27 (1) of the 1996 Constitution.

⁹³ Section 29 (1) of the 1996 Constitution.

⁹⁴ *Ibid* (note 391 above).

policies, and systemic injustices through litigation while actively seeking social change.⁹⁵ Challenging systemic injustices, discriminatory policies among other societal issues is just one but part of the measure which foster social change; therefore, the Bill of Rights is essential to litigation that aims to achieve social change.

Another crucial provision, section 38⁹⁶ encourages public interest litigation, in the sense that it allows individuals and organizations to bring legal actions on behalf of or in the interest of the marginalized communities or for the broader public good. In terms of section 38 it can be argued that it is common cause the rules of standing under the 1996 Constitution should be interpreted in a way that gives effect to the foundational values of the Constitution. Ngcukaitobi emphasizes that adopting a comprehensive interpretation of Section 38 would lead to the effective enforcement of constitutional rights.⁹⁷ Therefore, empowering civil society organizations and advocacy groups to challenge laws and policies that perpetuate social injustices. In short section 38 promotes public interest litigation and enables crucial issues to access the judicial system.⁹⁸

Furthermore, the establishment of an independent judicial body,⁹⁹ which encompass the court responsible for interpreting and upholding the Constitution is essential. Courts have the power and mandate to review laws and state actions to ensure compliance with Constitutional principles and human rights.¹⁰⁰ The Constitution further established the Constitutional court,¹⁰¹ as the apex court in South Africa.¹⁰² In 2013, it saw an extension of its jurisdiction,¹⁰³ allowing it to preside over cases with profound social, political, and constitutional ramifications.¹⁰⁴ As a result, courts, especially the Constitutional Court, function as a cornerstone for litigation to instigate shifts in the social fabric.

⁹⁵ M Pieterse (Note 39 above) 367-372, 378.

⁹⁶ Section 38 of the 1996 Constitution.

⁹⁷ T Ngcukaitobi, 'The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice,' (2002) *SAJHR*, 590, 603.

⁹⁸ S Budlender et al (Note 16 above) 129.

⁹⁹ Section 165 (2) of the 1996 Constitution.

¹⁰⁰ Ibid section 172.

¹⁰¹ See section 165-167 of the 1996 Constitution.

¹⁰² Ibid Section 167 (3).

¹⁰³ Section 167(3)(b)(ii) of the 1996 Constitution introduced by the Seventeenth Amendment Act, 2012 solidifies the Constitutional Court's authority over all types of cases.

¹⁰⁴ L Chenwi (Note 11 above) 430-438.

The courts are further mandated to craft effective remedies that are ‘just and equitable.’¹⁰⁵ In the case of *Fose v Minister of Safety and Security*,¹⁰⁶ the court held that appropriate relief ‘upholds the Constitution and deters future violations.’¹⁰⁷ Liebenberg argues this means that remedies ought to be tailored to address the unique circumstances of the specific litigants involved in the court case, while also considering the larger scope of institutional, legislative, and policy changes required to proactively prevent similar violations in the future.¹⁰⁸ These remedies and enforcement measures are there to ensure that court decisions and judgements are enforced effectively. Although it is debatable to what extent court judgments and decisions are enforced, one should consider the varying degrees of enforcement. This aspect, allows for the translation of legal victories¹⁰⁹ achieved through litigation to contribute to social changes.

4.3 Constitution of Zimbabwe Amendment (No. 20) of 2013 and its provisions

The 2013 Constitution of Zimbabwe introduced significant changes and provisions aimed at enhancing human rights and fostering social change in the country through litigation. Kondo observes that, to some extent, the 2013 Constitution partly reflects the South African Constitution's language, employing inclusive terms like "everyone has the right to" and emphasizing that the Bill of Rights applies universally, as a form of constitutional borrowing.¹¹⁰ Under the 2013 Constitution, socio-economic rights are justiciable in terms of the Declaration of Rights.¹¹¹ While it is notable that litigation is one of the tools available for achieving social change, it is essential to note that it is just one avenue among several others,

¹⁰⁵ Section 172 (1) of the 1996 Constitution.

¹⁰⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

¹⁰⁷ *Ibid* 97-98.

¹⁰⁸ S Liebenberg, ‘The Art of the (Im)possible? Justice Froneman’s Contribution to Designing Remedies for Structural Human Rights Violations,’ (2022) 12 *Constitutional Court Review*, 137, 152.

¹⁰⁹ It is however debatable whether legal victories do translate into tangible social change. See R Amit ‘Winning isn’t everything: courts, context and the barriers to effecting change through public interest litigation.’ In this article he discusses at length the limitations of public interest litigation including how court’s judgements may not be implemented by the government due to intransigence or resource constraints and so on.

¹¹⁰ T Kondo, ‘Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence,’ (2017) 17 *African Human Rights Law Journal*, 163, 175.

¹¹¹ See section 45, 46 and 85 of the 2013 Constitution. These provisions enshrine the justiciability, accessibility, interpretation, and application of the rights enshrined in Chapter 4 of the Constitution.

including advocacy, grassroots movements, and policy reform.¹¹² However, litigation can play a crucial role in addressing human rights violations and promoting social justice.

The Zimbabwean Constitution recognizes the right of all people to have access to justice. The right to access courts is constitutionally protected under the right to a fair hearing.¹¹³ To that effect, the Constitution,¹¹⁴ details the fundamental elements of the right to access the courts, which embody the concept of ensuring access to justice.¹¹⁵ These provisions seek to enable individuals or marginalized communities to access courts and to effectively seek legal remedies when their rights are violated.

The excessive fees associated with legal services can hinder access to justice for those unable to afford lawyers, deterring them from pursuing court remedies due to the perception of costly proceedings.¹¹⁶ In that regards, there has been an establishment of institutions such as the Legal Resources Foundation and legislation¹¹⁷ passed by the National Assembly on the provision of legal aid which seek to improve access to justice for the marginalised and vulnerable communities.¹¹⁸

The 2013 Constitution provides that courts have the power to craft appropriate remedies for the violations of socio-economic rights. Courts may make any order that is just and equitable,¹¹⁹ which may include an order limiting the retrospective effect of a declaration of invalidity for any period to allow the competent authority to correct the defect.¹²⁰ It is argued that, according to the 2013 Constitution, the key criterion for evaluating the court's remedies is their appropriateness. Thus, suitable relief refers to any appropriate remedy that is fair and

¹¹² See generally Budlender et al (Note 16 above), 96-108.

¹¹³ Section 69 (1)-(3) of the 2013 Constitution.

¹¹⁴ Ibid.

¹¹⁵ A Moyo, Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights (2019) 210.

¹¹⁶ Legal Resource Foundation (Note 27 above) 11.

¹¹⁷ Legal Aid Act [Chapter 7:16]; Section 31 of the 2013 Constitution.

¹¹⁸ H Othman & D von Riesen, 'Legal Services to the Poor People in Zimbabwe,' (2001) *Sida Evaluation 01/39 report*, 12. <<https://cdn.sida.se/publications/files/sida1578en-legal-services-to-the-poor-people-in-zimbabwe.pdf>>

¹¹⁹ Section 175 (6) (b) of the 2013 Constitution.

¹²⁰ See generally Farai Mushoriwa v City of Harare HC 4266/13.

just,¹²¹ thereby ensuring that the legal system remains adaptable and responsive to the evolving needs of society in pursuit of social change.

Furthermore, according to section 85 of the Constitution, a court has the authority to provide suitable remedies, such as issuing a declaration of rights and granting compensation.¹²² The then DCJ Malaba emphasized that this section serves as a fundamental basis for both procedural and substantive measures to ensure the effective protection of fundamental rights and freedoms and the enforcement of constitutional obligations.¹²³ In this context, section 85(1) of the Constitution acts as a linchpin in the relationship between litigation and social change. It enables individuals to seek legal remedies for rights violations, and through successful litigation, contributes to tangible impact on the ground for those entitled to rights. The court may, therefore, order remedies such as structural interdict/ supervisory orders which are more concerned with bringing systemic change to some extent, thereby contributing social change. The Law Society of Zimbabwe has observed that Zimbabwean courts are yet to fully adopt structural remedies.¹²⁴

To fully understand section 85 of the 2013 Constitution, one must acknowledge the changing dynamics of the judicial system, and the broader implications for access to justice and the protection of rights. Prior to 2013, the courts in Zimbabwe took a restrictive approach to standing.¹²⁵ However, this position was radically changed and liberalised by the 2013 Constitution.¹²⁶ Under the 2013 Constitution the principle of *locus standi* is now given an interpretation that is generous compared to the law prior. Therefore, it can be argued that anyone with a sufficient direct or indirect interest in a matter has a right to be heard before an appropriate court of law for relief. The purpose of this provision is to address the formal

¹²¹ JA Mavedzenge & DJ Coltart, *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Human Rights*, (2014), 60.

¹²² Note 83 above.

¹²³ Mudzuru at 13

¹²⁴ Law Society of Zimbabwe, 'Handbook on Constitutional & Electoral Litigation in Zimbabwe: Context, Legal Framework and Institutions,' (2018), 57.

¹²⁵ See s24(1) of the *Lancaster House Constitution*, 1979. For more on this see L Chiduzo and PN Makiwane article 'Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwe constitution,' as they argue that 'under the Lancaster House Constitution, the rules of standing required that a person approaching a court for relief was required to establish a personal and direct interest in the relief sought'.

¹²⁶ J Sloth-Nielsen & K Hove 'Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review' (2015) 15 *African Human Rights Law Journal* 554, 557.

shortcomings in the legal system and ensure meaningful justice is secured for the general population, especially for those who are economically disadvantaged, vulnerable, and marginalized.¹²⁷ However there is an acknowledgement that this provision has not been consistently applied and has been at odds with the approach taken by other courts in other jurisdictions.¹²⁸ However, it's undeniable that this provision in the 2013 Constitution enhances the role of litigation as a tool for driving social change. Therefore, when litigation is employed as a means for effecting social change, procedural rules can either support or impede litigation.¹²⁹

Similar to the 1996 Constitution, the 2013 Constitution includes fully justiciable socio-economic rights in its Declaration of Rights.¹³⁰ That is, chapter 4 encompasses socio-economic rights which among others includes the right to education,¹³¹ the right to health care,¹³² the right to food and water,¹³³ the right to shelter¹³⁴ and so on. These rights create obligations on the part of the state and non-state actors,¹³⁵ and a rights-based approach to social policy.¹³⁶ The government may fail to comply with its obligations for reasons such as 'incompetence, inattentiveness and intransigence' as argued by Roach and Budlender.¹³⁷ However, Ngang is of the view that, the justiciability of these socio-economic rights would ensure that the government is responsive and accountable to its people through litigation.¹³⁸ The justiciability

¹²⁷ F Mahere, 'Procedural rules and public interest litigation in Zimbabwe' in J Brickhill (ed) *Public interest litigation and social change in Zimbabwe* (2021) 51, 56.

¹²⁸ Ibid 57.

¹²⁹ Mahere (Note 127 above) 52.

¹³⁰ International Commission of Jurists, 'A guide for the litigation of economic, social, and cultural rights in Zimbabwe,' (2015) 184.

< <https://www.icj.org/wp-content/uploads/2016/09/Zimbabwe-Guide-ESCR-web-Publications-Thematic-Report-2015-ENG.pdf> >

¹³¹ Section 75 of the 2013 Constitution.

¹³² Ibid section 76.

¹³³ Ibid section 77.

¹³⁴ Ibid section 28.

¹³⁵ Ibid section 44.

¹³⁶ T Masuka 'The new Constitution of Zimbabwe and its implications for social workers' (2014) 2 *Journal of Social Welfare and Human Rights* 29.

¹³⁷ Roach & Budlender (Note 39 above) 345.

¹³⁸ CC Ngang, 'Judicial Enforcement of Socioeconomic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take 'Other Measures',' (2014) 14 *African Human Rights Law Journal*, 655, 661.

of socioeconomic rights therefore, not only holds governments and institutions accountable but also becomes significant for social change.¹³⁹

5. Case studies: Litigation and the advancement of socioeconomic rights

5.1 Case study: South Africa

In this context, I will consider the use of litigation in advancing the right to healthcare guaranteed in the 1996 Constitution.¹⁴⁰ Due to space constraints, I will consider specifically everyone's right to have access to healthcare services,¹⁴¹ as was litigated in the case of *Minister of Health v Treatment Action Campaign* (hereinafter referred to as the TAC case).¹⁴² The right to healthcare is particularly relevant to the current socio-economic, healthcare landscape in South African litigation. Additionally, focusing on a single right would allow for an in-depth examination of the legal, social, and policy aspects associated with the right.

The cause of action in the TAC case was the government's failure to provide HIV/AIDS treatment to pregnant women living with the virus so as to prevent mother-to-child-transmission (MTCT). This was during the period when South Africa witnessed the devastating impact of the HIV/AIDS pandemic, with an estimated 70,000 children born annually with HIV, and signs of increasing infant mortality due to MTCT.¹⁴³ Treatment Action Campaign (TAC),¹⁴⁴ along with several other organizations,¹⁴⁵ launched a legal challenge against the South African government, specifically the Minister of Health and other government entities. Litigation presented an opportunity for the poor and social advocacy groups to engage the state on an equal basis.¹⁴⁶

¹³⁹ Section 46 of the 2013 Constitution necessitates that when interpreting the Declaration of Rights, all courts must promote and uphold the principles and objectives articulated within it.

¹⁴⁰ Section 27 of the 1996 Constitution.

¹⁴¹ Ibid section 27(1)(a).

¹⁴² *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC).

¹⁴³ M Heywood, 'Preventing mother-to-child HIV transmission in South Africa: background, strategies, and outcomes of the Treatment Action Campaign case against the Minister of Health: current developments' (2003) 19 *SAJHR* 278, 280.

¹⁴⁴ The Treatment Action Campaign (TAC) is an influential civil society organization founded in 1998 to advocate for AIDS treatment access, known for its pivotal role in securing AIDS treatment programs in South Africa. < <https://www.tac.org.za/category/about/> >

¹⁴⁵ Children's Rights Centre; Cotlands Baby Sanctuary; Community Law Centre and Institute for Democracy in South Africa.

¹⁴⁶ M Pieterse (Note 39 above) 379.

TAC argued that the denial of treatment was unconstitutional and a violation of the right to health care services,¹⁴⁷ life,¹⁴⁸ and dignity.¹⁴⁹ This argument was justifiable based on the Constitutional mandate of the state to 'protect, respect, promote and fulfil'¹⁵⁰ the rights in the Bill of Rights, and it confirmed the justiciability of socio-economic rights such as the right to health.¹⁵¹

Initially, the High Court ruled in favour of TAC, mandating the provision of Nevirapine to infected mothers delivering in public institutions and instructed government to present a comprehensive plan for extending medication availability to all national birthing facilities. However, the Court's remedies lacked substantial penalties for noncompliance. On appeal, the Constitutional Court upheld the decision of the court a quo and further ruled that the government's policy failed to fulfil the state's constitutional obligation of providing access to healthcare services.¹⁵²

Mubangizi is of the opinion that the TAC case served as the catalyst for the introduction of anti-retroviral drugs in South Africa.¹⁵³ The decision had a profound influence, not only on the right to access healthcare services but also on socioeconomic rights as a whole.¹⁵⁴ Litigation contributed to a shift in government policy, moving towards a more proactive approach to HIV/AIDS treatment and prevention.¹⁵⁵ It established a framework for how the courts should review and enforce the obligation to ensure access to healthcare and other socio-economic rights.¹⁵⁶ This transformation is ascribed to the Constitutional Court's readiness to confront the executive branch in this specific field.¹⁵⁷

¹⁴⁷ Section 27 of the 1996 Constitution.

¹⁴⁸ Section 11 of the 1996 Constitution.

¹⁴⁹ Section 10 of the 1996 Constitution.

¹⁵⁰ Section 7(2) of the 1996 Constitution.

¹⁵¹ JA Mavedzenge & DJ Coltart (Note 121 above) 25.

¹⁵² Ibid (Note 121 above) 135.

¹⁵³ JC Mubangizi, 'Strategic Litigation in South Africa and Uganda: Shared Perspectives and Comparative Lessons,' (2021) 13 *African Journal of Legal Studies*, 351, 362.

¹⁵⁴ Ibid.

¹⁵⁵ JM Berger & A Kapczynski, 'The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa,' in D R Hurwitz & M L Satterthwaite (eds) *Human Rights Advocacy Stories*, (2009) 1, 26-27.

¹⁵⁶ Berger & Kapczynski (Note 153 above) 21.

¹⁵⁷ N Bruhn, 'Litigating against an Epidemic: HIV/AIDS and the Promise of Litigating against an Epidemic: HIV/AIDS and the Promise of Socioeconomic Rights in South Africa Socioeconomic Rights in South Africa,' (2011) 17 *Michigan Journal of Race and Law Michigan Journal of Race and Law*, 181, 201.

TAC's litigation demonstrated the impact of civil society organizations in holding governments accountable for their public health policies and the significance of broad standing rules in the Constitution.¹⁵⁸ This is evident from the cases brought before courts in the public interest or on behalf of the marginalised communities.¹⁵⁹

However, the litigation process was protracted, took several years. It required a range of expertise beyond the legal domain, including scientific, medical, and economic knowledge, alongside widespread public support for prevention of MTCT.¹⁶⁰ The lengthy litigation delayed the urgent implementation of necessary healthcare policies, impacting the speed of social change.

TAC asserted the court's duty to award 'appropriate relief' for the violation of the right to health care, therefore, a supervisory order was justified and necessary in this instance.¹⁶¹ However, the remedy and relief by the court did not by itself bring about the structural and systemic changes necessary for improving access to health care. Undoubtedly, there were notable challenges within the legal framework based on the separation of powers when it came to implementing the court order as it related to socio-economic rights.¹⁶²

Some scholars have observed that courts might be hesitant in enforcing socioeconomic rights.¹⁶³ Pieterse criticises the court in TAC case as not being assertive enough in ensuring that its decision was effectively upheld in practice. This was despite having affirmed its authority to order structural relief.¹⁶⁴ Upon reflection, the follow-up actions following the court victory in the TAC case can be said to be lacking.¹⁶⁵ The court order provided directives

¹⁵⁸ Section 38 of the 1996 Constitution

¹⁵⁹ Examples, *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC); *Centre for Child Law v Director General: Department of Home Affairs* (2) SA 131 (CC); *Doctors for Life International v Speaker of the National Assembly*, 2006 (6) SA 416 (CC)

¹⁶⁰

¹⁶¹ Budlender et al (Note 16 above) 56.

¹⁶² Pieterse (2008) 387.

¹⁶³ S Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty,' (2002) 6 *Law, Democracy and Development*, 159, 165; JM Berger & A Kapczynski (Note 153 above).

¹⁶⁴ Note 142 above, 113.

¹⁶⁵ G Marcus & S Budlender, *Astrategic Evaluation of public interest litigation in South Africa*, (2008), 91.

and mandates, however there were limitations in enforcing and monitoring compliance. Enforcing compliance is crucial for judicial remedies to have meaningful impact.¹⁶⁶

5.2 Case study: Zimbabwe

Under the 2013 Constitution, litigation has been instrumental in advancing socioeconomic rights.¹⁶⁷ The right to health care in particular is guaranteed and as such should be protected and promoted under the 2013 Constitution.¹⁶⁸ The Constitution guarantees the right to health care rather than explicitly providing for the right to health itself.¹⁶⁹ The right underwent litigation in several cases during the COVID19 pandemic, for example in *Combined Harare Residents Association (CHRA) v City of Harare*,¹⁷⁰ and in *Zimbabwe Association of Doctors for Human Rights (ZADHR) v Minister of Health and Child Care*.¹⁷¹

The Zimbabwe Human Rights NGO Forum in its report has highlighted that the 'healthcare system in Zimbabwe is severely underfunded and there is inadequate medical resources and medicines.'¹⁷² The country's healthcare system, including main state hospitals like Harare Central Hospital, grapple with deep-rooted issues such as medicine shortages, outdated equipment, and also shortages of personal protective equipment, oxygen, and ventilators.¹⁷³ These deficiencies had an adverse effect on the provision of healthcare services, for instance on frontline health workers such as nurses, nurse aides and pharmacists among others during the pandemic.¹⁷⁴ To that effect, the Zimbabwe Association of Doctors for Human Rights

¹⁶⁶ Pieterse (2008) 381.

¹⁶⁷ JA Mavedzenge, 'A Brief Review of the Jurisprudence and Litigation for the Enforcement of Socio-Economic Rights in Zimbabwe Since 2013' in J Brickhill (eds) *Public Interest Litigation and Social Change in Zimbabwe* (2021) 60, 61.

¹⁶⁸ Section 76 read together with section 44 of the 2013 Constitution.

¹⁶⁹ Amnesty International, Zimbabwe: Human Rights Under Attack – A Review of Zimbabwe's Human Rights Record in the Period 2018-2023 (2023), 10. < <https://www.amnesty.org/en/wp-content/uploads/2023/09/AFR4672212023ENGLISH.pdf> >

¹⁷⁰ *Combined Harare Residents Association (CHRA) v City of Harare* (unreported).

¹⁷¹ *Zimbabwe Association of Doctors for Human Rights (ZADHR) v Minister of Health and Child Care* (unreported) < <https://www.zlhr.org.zw/?p=2004> >

¹⁷² Zimbabwe Human Rights NGO Forum, 'Unlocking Human Rights During Covid-19 Pandemic Bulletin,' (2020) 6. < https://kubatana.net/wp-content/uploads/2020/05/Unlocking-Human-Rights-During-COVID-19-Pandemic_compressed.pdf >

¹⁷³ Southern Africa Litigation Centre, Submission on Zimbabwe's 3rd Universal Periodic Review (UPR) (2021) 3-4. < <https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/07/Zimbabwes-3rd-Universal-Periodic-Review-July-2021.pdf> >

¹⁷⁴ Zimbabwe Human Rights NGO Forum (Note 125 above) 6.

(ZADHR)¹⁷⁵ had a cause of action and initiated litigation to compel the government to take effective and proper action towards the realisation of the right to healthcare.

The remedy sought by ZADHR, was a set of court orders to compel the government to protect frontline health practitioners and the public from COVID-19.¹⁷⁶ The orders included providing personal protective equipment (PPE), equipping public hospitals, deploying testing kits so as to enhance the country's response to the pandemic and safeguard the well-being of healthcare professionals and the general population.¹⁷⁷ The court held that the government should ensure that adequate measures are taken such as the provision of Personal Protective Equipment (PPE), deployment of testing kits and establishment of additional testing laboratories among others.¹⁷⁸

The government had a positive obligation, as outlined in the Constitution,¹⁷⁹ to take reasonable legislative and resource-related measures for the progressive realization of the health care right. Health policy aims to enhance overall population health and equitably distribute it, often leading to resource allocation dilemmas due to competing goals.¹⁸⁰ However, the judiciary did not have the administrative or executive power necessary regarding policymaking, resource allocation, public health strategies. It relied on the government and other concerned authorities to execute and comply with its orders and obligations.

Litigation served as a tool for holding public officials accountable for their actions and inactions. Government ministers, such as Minister of Health and Childcare, Minister of Finance and Economic Development, and Minister of Transport were cited as respondents,¹⁸¹ and the legal process held them accountable for their roles in responding to the pandemic. This shows the necessity for collaborative efforts from various sectors beyond legal interventions for litigation to be fully effective. The impact of this is evident in later cases

¹⁷⁵ Note 168 above.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Section 76 of the 2013 Constitution.

¹⁸⁰ N Daniels, 'Resource Allocation and Priority Setting,' in MJ Selgelid et al (ed) *Public Health Ethics: Cases Spanning the Globe*, (2016) 61, 62.

¹⁸¹ Note 171 above < <https://www.zlhr.org.zw/?p=2004> >

where government officials are also held to account for violation of socioeconomic rights,¹⁸² setting a precedent for transparency and responsiveness in healthcare policies.¹⁸³ However, this collaboration suggests that litigation alone may not be sufficient, and a cooperative effort between stakeholders is essential for effective change.

The court order was not only meant to improve the capacity of the healthcare system, but also to address the right to healthcare by ensuring access to essential medical supplies for the population.¹⁸⁴ Due to resource constraints, administrative barriers, the effective implementation, and enforcement of the orders was challenging. The ZADHR in its monitoring and advocacy report, noted with concern that the government was violating the High Court ruling by not implementing its orders as they had not provided adequate PPE.¹⁸⁵ Therefore, while the court order mandated the provision of PPE and testing kits, it did not address the broader systemic issues that might contribute to the lack of preparedness and challenges with healthcare infrastructure, resource allocation.

6. Limitations of using litigation for achieving social change

Scholars have identified several structural and institutional elements that influence the effectiveness of litigation, that is, lack of rights awareness, lack of access to legal advice, practical barriers to access justice, a lack of confidence in the legal system, doubts regarding the likelihood of success, and the financial burden associated with legal proceedings.¹⁸⁶ I highlight some of these factors applicable in the case studies examined including non-implementation of court decisions, limited scope of the remedies and political interference.

6.1 South African litigation environment

One of the major limitations of litigation as a tool for achieving social change can be attributed to non-implementation of court orders. The discussion paper by AfriMAP and Open Society Foundation for South Africa argue that the government's failure to implement court orders

¹⁸² Moyo v Minister of Justice, Legal and Parliamentary Affairs [2021] ZWHHC 3; Stringer v Minister of Health and Child Care [2020] ZWHHC 259.

¹⁸³ Initiation of the Medical Services Amendment Bill, 2022.

¹⁸⁴ Amnesty International (Note 166 above) 31.

¹⁸⁵ ZADHR, 21st COVID-19 Monitoring and Advocacy Report (2020). < <https://www.zadhr.org/covid-19/141-8th-covid-19-monitoring-and-advocacy-report-28-july-2020.html> >

¹⁸⁶ Bruhn (note 157 above); M Pieterse (Note 39 above).

may have a detrimental effect in achieving social change through litigation.¹⁸⁷ The government in South Africa has been relatively reluctant in implementing court orders, for instance in cases dealing with refugees or migrants.¹⁸⁸ Failure by the government to implement judgements impedes access to justice. Therefore, this limits the concrete results meant to be achieved through litigation.

The potential of litigation may be limited due to the challenges in maintaining the Court's independence while evaluating government adherence to its obligations.¹⁸⁹ There is a worry that the Court, given the shared ideological connections of its justices with the current administration, might be less inclined to act in opposition to the incumbent's interests,¹⁹⁰ therefore limiting effectiveness of litigation.

The judiciary is dependent on other political institutions when it comes to enforcing its judgments.¹⁹¹ In the South African litigation environment, for litigation to be an effective tool, there must be a strong adherence to the rule of law.¹⁹² This means that court judgments should be respected and enforced by all relevant parties, for instance, the executive branch. However, if there are weak enforcement mechanisms, a culture of non-compliance, or selective implementation of court decisions, the judiciary's ability to drive social change through litigation can be compromised.¹⁹³

To maintain a balance, courts must exercise caution when issuing appropriate and just remedies and ensure not to encroach upon the policy-making or administrative functions of the other branches.¹⁹⁴ Therefore, the potential of litigation to bring about social change

¹⁸⁷ AfriMAP and Open Society Foundation for South Africa, 'South Africa Justice Sector and the Rule of Law: A discussion paper,' (2005) Open society foundation.

¹⁸⁸ See: Section27 Basic Education Rights Handbook – Education Rights in South Africa (2017), 137-138; Director-General of the Department of Home Affairs v De Saude Attorneys [2019] ZASCA 46. Specifically on the impact of DHA's maladministration on applicants.

¹⁸⁹ Bruhn (note 157 above) 209.

¹⁹⁰ Ibid.

¹⁹¹ Cummings & Rhode (Note 20 above) 607-608.

¹⁹² Section 1(c) of the 1996 Constitution.

¹⁹³ Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council, 'Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report,' (2015) 109. < <https://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015.pdf> >

¹⁹⁴ MT Thabo & KO Odeku, 'Separation of Powers, Checks and Balances and Judicial Exercise of Self-Restraint: An Analysis of Case Law,' (2021) 42 *Obiter*, 547, 550-557.

becomes restricted. This is because at times, other government branches may disregard court judgments, resulting in human rights violations.

6.2 Zimbabwean litigation environment

Socio-economic rights in Zimbabwe are still under threat, and the provision of healthcare remains insufficient, leading to limited enjoyment.¹⁹⁵ Some of the limitations in this discussion would include delayed judgements by the courts, misperception of the separation of powers doctrine by some of the judges and lawyers, absence of independent judiciary, a lack of judicial capacity and training on socio-economic rights, non-implementation of court decisions, lack of support from other branches of the government among others.

A significant challenge arises when courts fail to enforce or display hesitation in enforcing positive obligations.¹⁹⁶ Mavedzenge, therefore, argues that implementation of positive obligations, for instance socioeconomic rights, continues to be challenging to achieve.¹⁹⁷ He argues that the judiciary has been reluctant on enforcing positive obligations of the state. This supports the idea that the judiciary in Zimbabwe cannot enforce its decisions to some extent, hence, such renders the effectiveness of using litigation in achieving social change less and perpetuates disregard to the rule of law. Nevertheless, it is undeniable that the court, as evidenced in cases such as *Peter Makani*¹⁹⁸ and *Dusabe*,¹⁹⁹ has historically upheld Section 74,²⁰⁰ thereby advancing the effectiveness of litigation in achieving social change.

Due to the absence of an independent judiciary, individuals who have experienced human rights abuses are consistently deprived of the opportunity to seek justice and effective remedies.²⁰¹ There have been several attempts to enforce the state's positive obligations to

¹⁹⁵ Amnesty International (Note 166 above) 34.

¹⁹⁶ See for example, *Zimbabwe Homeless People's Federation v Minister of Local Government and National Housing* [2020] ZWSC 94, 34-42. The court pronounced on negative obligations of the state and avoided pronouncing on whether the state could be compelled to comply with its constitutional obligations in terms of ss19(2)(b) and 28 of the 2013 Constitution.

¹⁹⁷ Mavedzenge (Note 164 above) 66.

¹⁹⁸ *Peter Makani v Epworth Local Board* HH 550-14.

¹⁹⁹ *Dusabe v Harare City* [2016] ZWHHC 116.

²⁰⁰ Section 74 of the 2013 Constitution, "No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

²⁰¹ Amnesty International (Note 166 above) 34.

offer alternative housing to families who have been arbitrarily evicted,²⁰² but the courts have either rejected these petitions or avoided taking the matter up.²⁰³

Furthermore, the 2013 Constitution emphasizes the principle of separation of powers.²⁰⁴ In the case of *Combined Harare Residents Association*²⁰⁵ the applicant unsuccessfully sought an order to suspend s 4(2) of S.I 83/20²⁰⁶ as it infringed the applicants' right to health.²⁰⁷ The court held that suspending the statutory instrument would amount to interfering with executive function.²⁰⁸ This exemplifies a broader trend where judicial reluctance to intervene in matters that could be perceived as encroaching on other branches of government, curtailing the potential for addressing societal issues through litigation.

There has been somewhat a stringent approach to *locus standi* despite the idea that the provision should be interpreted in a generous and liberalised manner. This is evident in *Mpofu v ZERA*²⁰⁹ where the court held that *locus standi* in terms of section 85(1),²¹⁰ pertains to the violation of fundamental rights and freedoms outlined in Chapter 4 of the 2013 Constitution. Mahere argues that this shift in authority signifies a return to a more restrictive approach on *locus standi*, establishing a rigorous standard for access to court in constitutional matters and does not bode positively for cases involving public interest litigation.²¹¹ Therefore, the stringent requirements on standing make it difficult for certain groups to bring lawsuits and pursue social change through litigation. It cannot, however, be taken away that the right to standing has to some extent been effective to the use of litigation as a tool for achieving social change.

²⁰² See for example: *Zimbabwe Homeless People's Federation v Minister of Local Government and National Housing* [2020] ZWSC 94; *Zimbabwe Homeless Peoples Federation v Minister of Local Government and National Housing* [2021] ZWSC 78; *City of Harare v Makungurutse* [2018] ZWSC 46.

²⁰³ *Zimbabwe Homeless People's Federation v Minister of Local Government and National Housing* [2020] ZWSC 94, 34-42.

²⁰⁴ Section 3(2)(e) of the 2013 Constitution.

²⁰⁵ Note 167 above.

²⁰⁶ Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 Statutory Instrument 83 of 2020.

²⁰⁷ Section 76 of 2013 Constitution.

²⁰⁸ *Combined Harare Residents Association* (note 127 above) 14.

²⁰⁹ *Mpofu v ZERA & 2 Others* Constitutional Court unreported case CCZ 13/20.

²¹⁰ Section 85(1) of the 2013 Constitution.

²¹¹ F Mahere (Note 127 above) 57.

7. Conclusion

This article explored the role of litigation in effecting social change within the healthcare sector both Zimbabwe and South Africa. It considered the strategies, particularly litigation, as employed by civil society and social movement organizations to leverage constitutional provisions in their pursuit of improved access to healthcare services and the broader goal of driving social change. The constitutional framework for litigation in South Africa and Zimbabwe presents both opportunities and challenges. The legal systems share similarities and differences which influence the effectiveness of litigation.

Notably, the research highlighted that litigation has the potential to bring about change by providing effective remedies for litigants. There is a need for effective vindication of rights in South Africa and Zimbabwe where, so few have means to turn to courts. There remains a scarcity of successful litigation instances concerning the right to access healthcare specifically in Zimbabwe. This was attributed, in part, to the judicial system's approach to handling socio-economic rights cases and lack of independence. Hence, the state ought to implement impactful measures to safeguard the independence of the judiciary. These measures should encompass ensuring sufficient financial support and consistent, systematic training for judicial personnel.²¹²

Governments can further strengthen legal aid programs to provide free or subsidized legal services to individuals who cannot afford representation.²¹³ These programs can help bridge the access-to-justice gap and ensure that marginalized individuals have an avenue to protect their rights.²¹⁴ Further, training and supporting community-based paralegals can help extend legal services to underserved communities.²¹⁵ Paralegals can provide legal advice, educate communities about their rights, and assist individuals in navigating legal processes.

To ensure effectiveness of litigation, courts should embrace innovative remedies and instruct state officials to take specific actions to protect human rights.²¹⁶ However, these directives

²¹² Amnesty International (Note 166 above) 36.

²¹³ Legal Resource Foundation (Note 29 above) 10-15.

²¹⁴ Ibid.

²¹⁵ Ibid 10.

²¹⁶ A Moyo, Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights, (2022) 2edn 38.

should strike a balance, avoiding excessive detail to preserve the operational independence of state political entities. Such remedies could be relevant in the Zimbabwean context where the government is often reluctant in enforcing and implementing court orders. Having awareness of the context in which decisions are issued can assist the courts design more effective structural remedies.

It should be a lesson that where there is failure there is a need to inculcate and entrench a culture of constitutionalism and respect for the rule of law in public officials. There is a need for state officials to understand judicial processes especially in Zimbabwe where state officials continue to violate rights of the people. This further raises the need for sustained litigation to enforce positive obligations such as compelling the state officials to provide, for instance, compensation for victims of socioeconomic rights violations. This might deter the government from being recalcitrant in future as it enforces the idea of accountability.

The case studies arguably demonstrated the constitutional framework's potential for effecting social change through litigation. However, institutional barriers hinder the enforcement of court decisions in the realm of socio-economic rights, ultimately impeding the overall effectiveness of litigation efforts. Hence, there is a need for institutional trust between courts, executive and civil society. This can be done by promoting institutional dialogue. The utilisation of institutional dialogue such as alternative dispute resolution as part of the litigation process would assist in making litigation an effective tool for social change.

Based on the case studies presented above and my evaluation, I can infer that for litigation to effectively contribute to social change, despite its limitations, it should be combined with other strategies. These strategies might include conducting public information campaigns to raise awareness of rights, engaging in social mobilization and advocacy, and providing advice and assistance.

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